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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1973

No. 73-595

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and BELL TELEPHONE COMPANY OF NEVADA, *Petitioners*

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*

CITIZENS UTILITIES COMPANY and CITIZENS UTILITIES COMPANY OF CALIFORNIA, *Real Parties in Interest*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION FOR REAL PARTIES IN INTEREST CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA

### QUESTIONS PRESENTED

Petitioners' presentation of their "Questions Presented" begins with a preamble full of legal and factual

**false assumptions. Petitioners then pose three questions which attempt to ignore the procedural posture in which this case appears here. Real Parties in Interest suggest that the questions presented are more accurately stated as follows:**

1. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion in refusing to review, on mandamus, an order of the District Court denying a motion for summary judgment?

2. If so, was the District Court without jurisdiction to hear a case in which petitioners and others were charged with violations of §§ 1 and 2 of the Sherman Act by reason of State and Federal statutes providing for regulation of some aspects of the telephone industry by State and Federal regulatory bodies, respectively?

3. Did the United States Court of Appeals for the Ninth Circuit abuse its discretion in refusing to review, on mandamus, an order of the District Court refusing to stay proceedings in a private antitrust case pending referral to the Federal Communications Commission and to the California Public Utilities Commission, respectively, for advisory opinions of those bodies on portions of issues in this case no longer within the power of those bodies to decide?

4. If so, was the District Court absolutely required to stay proceedings in the private antitrust action before him pending referral of certain issues in the case to the Federal Communications Commission and of certain other issues in the case to the California Public Utilities Commission for advisory opinions of those bodies on portions

of issues in the case no longer within the power of those bodies to decide?

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## STATUTORY PROVISIONS INVOLVED

Petitioners have neglected to mention that this lawsuit was brought under §§ 1 and 2 of the Sherman Act and § 4 of the Clayton Act. These provisions are reprinted in the Appendix hereto.

Also involved in the case are Sections 206, 207 and 221 of the Communications Act of 1934. They also are reprinted in the Appendix.

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## STATEMENT OF THE CASE

Petitioner American Telephone and Telegraph Company will be referred to hereinafter as "AT&T", petitioner The Pacific Telephone and Telegraph Company as "PT&T", petitioner Bell Telephone Company of Nevada as "Nevada Bell" and respondents, collectively, as "Citizens". AT&T and the various corporations (including PT&T and Nevada Bell) which it controls through either 100% or majority stock ownership, are referred to hereinafter collectively as the "Bell System".

Since the petition is seeking, in effect, the summary judgment for petitioners which the District Court refused to grant, the facts must be taken in the light most favorable to Citizens.

References hereinafter to ("C.A. Appx. .....") are to pages of the Appendix filed by petitioners in the Ninth

Circuit in their unsuccessful quest for a writ of mandamus or prohibition in the Ninth Circuit.

Petitioners and the rest of the Bell System are charged in this case with monopoly and with horizontal conspiracy to fix the prices which they charge independent telephone companies for access to the rest of the telephone world through Bell System facilities, all in violation of §§ 1 and 2 of the Sherman Act. (C.A. Appx. 8) While roughly 20% of the telephones in America are owned by independent (i.e., non-Bell System) companies, the Bell System has a total, "bottleneck" monopoly on long-distance telephone transmission facilities. (C.A. Appx. 408, 886, 1043) This monopoly is a result, in part of ownership of America's "long lines" through AT&T's "Long Lines Division." In part, the Bell System monopoly results from Bell System dominance of telephone service in the most populous parts of America through its 23 operating companies, including PT&T and Nevada Bell.

The independents (including Citizens) are ranged around the periphery of the Bell System. In order to provide nationwide telephone service (as all do and must do) the independents must interconnect with their adjacent Bell System companies. The contracts by which such interconnection takes place are called "traffic agreements."

Traffic agreements between Bell System companies (including petitioners) and independents (including Citizens) generally are *not* regulated. They are negotiated. They are private contracts. They come in a variety of forms (although two general types are most common) and they require, like all contracts, the assent of both parties.

While traffic agreements are "filed" with the F.C.C. *in the carriers' own files* (see Petition, p. 6, f.n. 5) the "filing" has no legal effect—unlike the filing of tariffs, which does. (47 U.S.C. § 203(c))

Petitioners do not contend that they have ever submitted their settlement disputes with Citizens to either the F.C.C. or the California P.U.C. They affirmatively assert that Citizens never has presented the settlement dispute to any regulatory agency. (Ptrs' Br. p. 7) In fact, then, no regulatory agency has ever passed upon this long-standing dispute.

While the Bell System has offered independents (including Citizens) some choice in type of settlement arrangement, the choices have been Hobson's choices—all bad. This is a direct result of the Bell System "united front" on settlements, stage-managed from AT&T headquarters at 195 Broadway in New York. That is where Bell System policy on settlements is made. Petitioners conceded as much below. (C.A. Appx. 105)

In the absence of the conspiracy among Bell System companies, the independents in the telephone industry would have done much better in their negotiations with their Bell System companies. Arrangements agreed to by one Bell System company with its connecting independents would have become known in the industry, setting precedents for comparable demands by other independents elsewhere. The disparity in bargaining power between the larger independents and their single connecting Bell System companies is much less than the disparity between the larger independents and the Bell System as a whole, acting in concert.

In fact, as the years have passed and the independent segment of the telephone industry has become more concentrated (4,359 independents in 1953 as against 1,700 in 1971) settlement arrangements which the Bell System has been willing to offer the independents have significantly improved. (See C.A. Appx. 341, 882)

That the Bell System's conspiracy has damaged Citizens can hardly be doubted, but the amount of Citizens' damages was of course not reached below and is not an issue here.

**A. How settlements between the Bell System and the Independents are actually arranged**

Most of the discovery in this case has been directed to how the Bell System establishes the formulas and ground rules by which Bell System companies settle with the independent segment of the industry for interchanged traffic. This, it turns out, is all handled outside of any regulatory framework whatever. Rather, AT&T has orchestrated and controlled negotiations on behalf of the entire Bell System in developing standard forms of settlement arrangements for inclusion in traffic agreements between Bell companies and their connecting independent companies.

For the last several decades, negotiations have gone on in private between AT&T on the one hand and an association known as the United States Independent Telephone Association ("U.S.I.T.A.") on the other hand. While regulatory officials undoubtedly know that these negotiations occur from time to time, and are advised of their outcome through the trade press, or otherwise, the process by which the Bell System obtains its "standard"

settlement schedules is entirely a matter of private negotiation. The two types of settlements which the Bell System has offered to connecting companies are the so-called "cents-per-message" or "average cost" schedules and the so-called "actual cost study" settlement.

The "cents-per-message" schedules have generally been worked out between AT&T and U.S.I.T.A. without regulatory participation and jointly "sold" to the industry.

Actual cost settlements have been, generally, the product of individual negotiations between Bell System companies and their connecting independent companies on the basis of principles laid down by the Bell System.

**1. Cents-Per-Message Schedules.**

The main settlement approach which the Bell System companies have offered their independent connecting companies is a uniform settlement schedule keyed to the "average revenue per message" generated by the toll calls which the independent company interchanges with the connecting Bell System company. These schedules have purportedly been based upon the average costs incurred by an allegedly representative sample of independent companies in providing their portion of the service in handling interchanged traffic. These are the "cents-per-message" or "CPM" or "average cost" schedules.

However, the cents-per-message schedules have in fact been the result of "negotiations" between U.S.I.T.A. committees and AT&T. The results of these negotiations have been recommended to the independent industry by U.S.I.T.A. and to the Bell System operating companies by AT&T. (C.A. Appx. 849-856)

**No Bell System company has ever, at any time here material, refused to follow AT&T's recommendation to offer a new cents-per-message schedule to its connecting independent companies as a basis of settlement. The vast majority of independent companies in the United States have always settled with their connecting Bell companies on the basis of the cents-per-message schedules. (C.A. Appx. 980, 945-946)**

**2. Actual Cost Settlement.**

In an "actual cost study" type of settlement, the expenses of the independent company in providing services on traffic interchanged with the Bell System and the independent telephone company's investment related to that business are determined by an accounting allocation process known as a "separation."

Once the independent company's expenses and investments related to the interchanged business have been "separated," settlement is made between the independent company and the connecting Bell System company on a basis designed to return to the independent company its costs of providing the plant and services related to the interchanged traffic, together with a rate of return on the independent telephone company's investment related to the interchanged traffic.

In order to perform the separation of expenses and investment for a cost study settlement, separations procedures must be used. These procedures, sometimes embodied in a "manual," are a series of accounting and engineering assumptions and instructions. (C.A. Appx. 205, 706, 744) Choice of these assumptions obviously affects settlements.

Citizens expects to prove at trial that the Bell System companies combined and conspired to:

(a) Resist the use of actual costs studies as a basis for developing settlement between independent companies and Bell System companies;

(b) Take all necessary and appropriate steps to hamper the development of separations procedures and separations manuals which independents, and particularly smaller independents, could readily and easily employ in making actual cost studies;

(c) Maintain a united front with respect to particular elements of proposed separations procedures in order to maximize the returns of the Bell System and minimize the return to the independent telephone companies, including resistance to the adoption and application of the "Charleston Plan";

(d) Insist upon the inclusion of inadequate "rates of return" upon independent company investment related to interchanged traffic, and insist upon inclusion of rates of return not higher than the ostensible "toll" rates of return of the Bell System companies;

(e) Conceal the true rates of return obtained by the Bell System companies and by the connecting independent companies on the interchanged business.

**3. The Bell System has Subverted the U.S.I.T.A. Negotiators.**

The Bell System has not only succeeded in keeping settlements within the confines of private negotiations with U.S.I.T.A. but also managed to exert considerable control over U.S.I.T.A.'s negotiators by means of special, advantageous arrangements for the independent com-

panies from which the U.S.I.T.A. negotiators come. The evidence of Bell's subversion need not be detailed here. This is not a trial court. The evidence mentioned in warding off summary judgment is by no means all the evidence on the point. And in any event, petitioners conceded the fraud in connection with the ruling here (improperly) appealed from. (C.A. Appx. 105)

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## ARGUMENT

### A. Petitioners are seeking review of a patently non-appealable order by petition for certiorari to review denial of a writ of mandamus.

Apparently realizing that there is no defense to this case on the merits, petitioners challenged the trial court's jurisdiction to hear the case by repeated motions for summary judgment. They were rebuffed. In a last ditch effort to prevent the case from coming to trial, petitioners sought a writ of mandamus or prohibition from the Court of Appeals for the Ninth Circuit to review the patently non-reviewable interlocutory orders denying their motions for summary judgment.

Not surprisingly, the Ninth Circuit denied the writs out of hand.

Nothing daunted, petitioners are now here seeking review of the Ninth Circuit's denial of mandamus and prohibition in attempting to carry their appeal from non-appealable orders one step higher.

There is no justification for this extraordinary deviation from settled principles governing federal appeals. The issues presented by this case can be and should be re-

viewed upon an appeal from the final judgment if the losing party is inclined to take an appeal at that time.

**B. The "Record" in this case is not appropriate for review at this time.**

The "Record" here consists of two opinions of the District Court, certain documents presented to the Ninth Circuit by petitioners as an appendix to their petition for a writ of mandamus or prohibition and the Ninth Circuit's denial of those writs without opinion. The appendix filed by petitioners in the Ninth Circuit consists of certain evidence mentioned by Citizens in opposition to motions for summary judgment in the District Court. While the District Court found that evidence sufficient to preclude summary judgment, it is but a small fraction of the total evidence in the case.

Now, however, petitioners are seeking what amounts to a final review of the case on its merits without first having permitted either the District Court or the Ninth Circuit to consider the case in the context of all of the evidence.

There can be no doubt about petitioners' desire to appeal the ruling of the District Court in this matter. They asked for, and did not obtain, the ruling of the District Court which is prerequisite to an immediate appeal under the provisions of 28 U.S.C. Sec. 1292(b). (Ptn. p. 8).

But the whole point of 28 U.S.C. § 1292(b) is that interlocutory appeals are permissible only with the certification of the trial court—which was denied here.

**C. This case presents no unique or extraordinary questions requiring review by certiorari.**

The Ninth Circuit rendered no opinion in this case; its denial of mandamus or prohibition has essentially no precedential value whatever.

Moreover, the Ninth Circuit's action in denying the mandamus petition without opinion, as such, was fully justified in the light of ample precedent on that subject. *Will v. United States,* 389 U.S. 90 (1967); *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1942); *Japan Line Ltd. v. Sabre Shipping Corp.,* 407 F.2d 173 (2nd Cir. 1969).

As for the District Court's opinions, they were correct. Telecommunications is, at best, a partially regulated industry in which the partial regulation is shared between state or local authorities. The paralyzing effect of this form of divided regulation is readily demonstrated by the facts of this case, in which the crucial settlement arrangements between petitioners and Citizens have never been regulated, in fact, by either federal or state regulatory authorities.

The District Court had before it not only all of the cases cited in the petition, but also other decisions of this Court and of the Courts of Appeals for the various circuits.

We respectfully submit that this Court's opinion in *Otter Tail Power Company v. United States,* 410 U.S. 366 (1973) fully supports the decision of the District Court to permit this case to go to trial under the antitrust laws notwithstanding the possibility that regulatory agen-

cies might also have jurisdiction over some phases of the problem. In *Otter Tail,* of course, parallel regulatory proceedings were not only a possibility, but an actuality.

Even if the District Court erred (which it did not), such an error would hardly justify an immediate review, by this court, on a truncated record, without the benefit of intervening consideration of the Court of Appeals.

**D. This is a classic antitrust case.**

Petitioners suggest, in various ways, here and below, that the antitrust laws are inapplicable to a nationwide price fixing conspiracy of 23 separately incorporated corporations, controlled through varying degrees of stock ownership by AT&T.

First of all, there is no doubt that Bell System companies can violate the antitrust laws by conspiring among and between themselves and with their parent AT&T. *Perma-Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 141-142 (1968); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 215 (1951).

Whether this conspiracy be thought of as a conspiracy between sellers or between buyers of long-distance telephone transmission services is basically immaterial; a price fixing conspiracy or monopoly on the buying side is as illegal as a monopoly or price fixing conspiracy on the selling side. *Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 235 (1948).

Petitioners make the curious argument that the anti-trust laws cannot apply here because there is "no competition." If they mean that there is no competition between petitioners and Citizens, the argument is without merit; parties injured by a price fixing conspiracy are usually the customers or suppliers of the conspiracy, not its competitors. See *Chattanooga Foundry, Mandeville Island Farms, supra.*

If petitioners are arguing that there is no competition among and between themselves, they are, in essence, confessing the violation charged. True, the Bell System has a monopoly of long-distance transmission of message toll telephone service. It need not have. On other kinds of long-distance data transmission, the Bell System faces competition. See, e.g., *In the Matter of AT&T,* 23 FCC 2d 503.

Moreover, absent the conspiracy here alleged, there would have been a species of competition between the various operating companies of the Bell System to develop alternative methods of handling settlements on a consensual basis.

Petitioners certainly face no disability in paying treble damages if an award of treble damages is justified on the law. See e.g., *Carter v. AT&T,* 365 F.2d 486 (5th Cir. 1966), cited by petitioners. Indeed, the accounting system prescribed by F.C.C. regulations for telephone companies within its jurisdiction makes express provision for the possibility that a telephone company will be charged with a forfeiture or penalty and prescribes the accounting treatment of such payments. See 47 F.R.C. § 31.370; FCC Order 70-1278 of Dec. 9, 1970, 26 FCC 2d 889 (1970).

Conversely, a regulated utility faces no disability in collecting treble damages, and it is no answer for petitioners to suggest that any injury which Citizens may have suffered has been "passed on" to Citizens' rate-paying customers. That argument was rejected in every regulated electric utility case which considered the issue. See *Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company,* 335 F.2d 203 (7th Cir. 1964); *Ohio Valley Electric Corporation v. General Electric Company,* 244 F. Supp. 914 (D.C. S.D. N.Y. 1965); *Public Utility District No. 1 v. General Electric Company,* 230 F. Supp. 744 (D.C.W.D. Wash. 1964); *Atlantic City Electric Company v. General Electric,* 226 F. Supp. 59 (D.C. S.D. N.Y. 1964); *cf. Philadelphia Electric Co. v. Westinghouse Electric Corp.,* 308 F.2d 856 (3rd Cir. 1962).

**E. Settlements between telephone companies are not "pervasively regulated".**

Petitioners have made a skilfull effort to blur the distinction between telephone *rate* regulation (which is intended to be reasonably pervasive) and the theoretical power of commissions to become involved in settlements (which is seldom, if ever, exercised). The distinction is important.

Petitioners have also neglected the important distinction between F.C.C. regulation of interstate telephone service and California P.U.C. regulation of intrastate service. While the California P.U.C. has, from time to time, carried rate cases through to their conclusion, the F.C.C. abandoned its only attempt at overall rate regulation of Bell System rates after "off-the-record"

negotiations with the parties. *In the Matter of AT&T*, 23 FCC 2d 503, 505 (1970). The F.C.C. has never involved itself in settlement at all.

**1. The F.C.C. Does Not "Pervasively Regulate" the Telephone Business.**

Much of petitioners' argument hinges upon their quotation of dictum from *United States v. R.C.A.* 358 U.S. 334, 348-350 (1959) to the effect that the telephone industry is "pervasively regulated." That dictum was entirely unnecessary to the decision of the case, which *held* that the antitrust laws are fully applicable to radio and television broadcasting. *R.C.A.* made particular reference to rates, as a subject of regulation, and of course that distinction is valid; there is no statutory basis for control over the advertising charges of a radio or television station, but there is at least theoretical power in the F.C.C. to regulate interstate telephone rates.

Of course, the practice of the F.C.C. has been to regulate by means of so-called "continuous surveillance," without ever actually regulating anything. In other words to avoid the remote possibility that the F.C.C. might someday exercise its statutory authority to establish telephone rates, AT&T files a tariff which it thinks will not provoke the F.C.C. to regulatory action, and the F.C.C. lets it sit there. The F.C.C. has, itself, made the point that this sort of regulation does *not* amount to "agency action!" See *In the Matter of AT&T Co.*, 20 FCC2d 886, 889 (1969).

This curious kind of "regulation" was possible because the mere "filing" of a tariff has legal consequences. Once filed in accordance with 47 U.S.C. § 203, a tariff on interstate calls must be followed (47 U.S.C. §203(c)), and

may not be changed ". . . except after thirty days' notice to the Commission and to the public. . . ." (47 U.S.C. § 203(b)).

In contradistinction to § 203 and numerous other sections dealing with ". . . charges, practices, classifications and regulations. . . ." as between telephone companies and the *public,* there is practically no mention of settlements *as between telephone companies* in the federal statutory scheme.

To be sure, telephone companies were, at one time, required to file under 47 U.S.C. § 211(a), copies of "all contracts, agreements or arrangements with other carriers . . ." as well as any other contracts of any kind which the F.C.C. wants filed under 47 U.S.C. § 211(b). However, the "filing" of such contracts, unlike tariff filings, had no legal consequences. It was informational; the contracts were there if the F.C.C. ever decided to look at them.

The F.C.C. officially recognized the totally meaningless character of the "filing" of traffic agreements when it modified its rules in 1970 so that telephone companies could meet the "filing" requirements for traffic agreements between domestic common carriers by *not* filing them with the F.C.C. but rather by keeping them on file in the records of the carriers themselves. See 47 CFR § 43.51(c), 35 FR 17412 (Nov. 13, 1970) and F.C.C. decision 70-1194, 26 FCC2d 512 (1970) explaining the change.

At most, the F.C.C. might have the power to referee the "divisions of charges" for interstate calls as between the Bell System and the independents under 47 U.S.C.

§ 201(a). That is the only part of the Federal Communications Act which deals with the "divisions" of charges as opposed to the charges themselves. Petitioners cite no case anywhere, anytime, in which the F.C.C. has purported to use that power.

**2. The California Regulatory Scheme Cannot Immunize an Interstate Antitrust Conspiracy.**

Petitioners find no more support for their "pervasive regulation" argument in the California regulatory scheme than they find in the federal system.

The State of California does have the power to control telephone rates on intrastate calls. It also apparently has the power to control divisions of revenues on at least some phases of intrastate traffic as between connecting telephone companies. The California P.U.C. has, in fact, on several occasions, ordered certain divisions between petitioner PT&T and independent telephone companies other than Citizens, usually over determined opposition of PT&T; as late as California Public Utilities Decision No. 74917 (1968), 69 Cal. P.U.C. 53, PT&T was still fighting the California P.U.C.'s jurisdiction to establish divisions of revenues under California Public Utilities Code § 766 "absent disagreement of the parties and hearing" (69 Cal. P.U.C. at 75).

**3. Administrative Knowledge of Private Dealings Does Not Confer Antitrust Immunity.**

It may be assumed that the F.C.C. and the California P.U.C. are aware that the Bell System is comprised of a number of separate corporations, and that they get together from time to time to decide how they are going

to handle the independent segment of the industry in negotiating new industry-wide settlement formulas.

It may also be assumed that the F.C.C. and the California P.U.C. know that, from time to time, Bell System representatices meet with representatives of the U.S.I.T.A. to negotiate those formulas.

However, all of the negotiations are private in the sense that regulatory officials do not participate in them. The most that can be said is that the regulatory bodies have apparently not taken action to halt the practice.

Of course, administrative knowledge of, or even acquiescence in, an unlawful agreement or practice does not immunize the activity from antitrust liability. *United States v. Socony-Vacuum Oil Co.* 310 U.S. 150, 225-227 (1923); *cf. American Column & Lumber Co. v. United States,* 257 U.S. 377, 411 (1921).

**F. The District Court properly denied a stay.**

Petitioners contend that Judge Harris abused his discretion by not staying the action until the plaintiffs presented their claims to the appropriate regulatory commissions.

This contention bears analysis.

First of all, it assumes that plaintiffs' claims under the antitrust laws are cognizable by some administrative body, which clearly they are not, since the District Courts have exclusive jurisdiction in private antitrust cases.

Secondly, petitioners' contention suggests that Citizens' antitrust claims be split up in some way between the

F.C.C. and the California P.U.C. for resolution, but does not suggest how.

Thirdly, petitioners' contention assumes that plaintiffs must have the burden of bringing proceedings in some agency. In fact, agency resolution of whatever might be resolved by some agency has been studiously avoided by petitioners during all the long years of this controversy. The burden, of course, is on them to obtain whatever immunity (if any) might be obtainable as a result of agency action. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 216-217 (1966).

**G. The District Court did not abuse its discretion in refusing to refer this case to the F.C.C. and/or the California P.U.C. for decision.**

The District Courts have considerable discretion to proceed with cases or to refer them to administrative agencies for consideration under the "primary jurisdiction" doctrine. *Carter v. AT&T,* 365 F.2d 486 (5th Cir. 1966), relied upon by petitioners, is not applicable here. In *Carter,* the reference could be made, and was made, solely to the F.C.C. for consideration of a tariff filed with the F.C.C. The "split" reference which petitioners apparently seek in the case at bar (conspiracy to fix intrastate settlements to be referred to the California P.U.C., same conspiracy to be referred to F.C.C. in its interstate aspects) was not involved in *Carter.*

Moreover, as the *Carter* court notes, the antitrust case depended upon the validity of a tariff. The court said, *inter alia,* "First, a tariff, required by law to be filed, is not a mere contract. It is the law." (365 F.2d at 496)

Here, of course, we are dealing with a "mere contract" which the parties are free to change from time to time, and which they are now required to "file" only with themselves. 47 C.F.R. § 43.51(e). By no stretch of the imagination is this kind of contract "the law."

*Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973), relied upon by petitioners, deals with a rather unusual fact situation in an industry utterly unrelated to the transmission or carriage of anything (electricity, gas, passengers or telephone messages), but involving unique problems essentially internal to the management of a commodity exchange. In the face of the direct holding of *Otter Tail Power Company v. United States,* 410 U.S. 366 (1973), rejecting primary jurisdiction in the fact of actual regulation of a *utility, Ricci* would not appear to be controlling here.

The essence of the antitrust charge in *Ricci* was an alleged conspiracy to deprive Ricci of his seat on the Exchange *in violation of the rules and regulations of the Exchange.* The question was, had Ricci's seat in fact been transferred in violation of rules of the Exchange and of the Commodity Exchange Commission?

The Court found it necessary to determine, as a first step in *Ricci,* whether or not the rules of the Exchange had been violated *as alleged by the plaintiff.* Only after that had been determined would the antitrust issue become clear. Accordingly, the Court sent the case to the Commodity Exchange Commission for a determination of the validity of transfer of Ricci's exchange membership under the rules and regulations of the Exchange and of the Commission.

Here, by contrast, there is no "self-regulatory" body sanctioned by statute. Citizens charges no violation of rules or regulations of any administrative body or of any private self-regulatory body remotely authorized by statute or administrative rule. The "self-regulation" charged here is the unofficial, unsupervised, unregulated "regulation" imposed by a cartel dominated and controlled by defendant AT&T. This totally unauthorized and governmentally unregulated "private government" is the very definition of a contract, combination and conspiracy in violation of the Sherman Act.

The controlling case here is *Otter Tail Power Co. v. United States,* 410 U.S. 366, (1973). The salient facts of *Otter Tail* bear repeating. Like the petitioners here, Otter Tail was a "regulated" public utility engaged in providing a transmission service. Most but not all of the power transmitted by Otter Tail was generated by Otter Tail. (Here, most but not all of the telephone calls transmitted by the Bell System are generated within the Bell System.) Otter Tail occupied a "bottle neck" position with respect to municipal electrical systems which wished to transmit power through Otter Tail from the point at which power was generated to their own distribution systems in which the power could be used. (The Bell System controls most of the long distance lines in America, and an independent company is forced to interconnect with the Bell System in order to transmit its long-distance calls.)

Of course, in the *Otter Tail* case, the defendant's central "bottle neck" position was used to enhance Otter Tail's power at the retail level; Otter Tail refused to transmit power. In the case at bar, the Bell System has

not refused to interconnect with independents, but has instead used its central position and its considerable economic power to establish prices on interchanged traffic which are completely unfair and inadequate to plaintiffs. That is a distinction without a difference.

If there is a difference, it is that Otter Tail acted alone. In the case at bar, a conspiracy among a number of separately incorporated and separately owned corporations comprising the "Bell System" has operated in concert to achieve the unlawful result.

Finally, in *Otter Tail,* the F.P.C. not only had the power to regulate the matter in issue, but *actually exercised it concurrently with the District Court!*

While this Court vacated the judgment in *Otter Tail* on other grounds, it affirmed the District Court's assertion of its own jurisdiction and its judgment that Otter Tail had violated the antitrust laws. The *Otter Tail* majority rejected both the "immunity" or "exclusive jurisdiction" approach of *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973) and the "primary jurisdiction" approach of *Ricci.*

Even the dissenting Justices, who felt that Otter Tail's monopolistic practices were justified, or at least not subject to the District Court's jurisdiction in the first instance, noted that ". . . *If Otter Tail had combined with other retailers of electricity and undertaken mutual noncompetition agreements, this would be a different case.*" (Dissent, footnote 5; emphasis added).

In the case at bar the existence of the horizontal conspiracy among 23 Bell companies is not seriously disputed. (C.A. Appx. 105). Thus, even the dissenting

Justices in *Otter Tail* would seem to concur in the assertion of the District Court's jurisdiction in this case.

**H. Hughes Tool Co. v. Trans World Airlines, Inc. has no application here.**

Petitioners urge dismissal of this case on the authority of *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973). The suggestion has no merit.

*Hughes Tool* dealt with a series of activities of Hughes Tool Co. constituting control over Trans World Airlines. Those were activities which, if approved by the C.A.B. were by statute, *immunized* from antitrust attack. This Court found that indeed each of the challenged actions of Hughes Tool had been expressly approved, and thereby immunized by C.A.B. order.

In the case at bar, no similar contention can be made. There is no statute suggesting that arrangements otherwise violative of the antitrust laws, but passed by the California P.U.C. would be immunized for any purpose, and yet petitioners argue that the California P.U.C. is one of the agencies with exclusive jurisdiction of the matters here in issue. As for the F.C.C. express antitrust immunity is provided for certain mergers which are consummated with F.C.C. approval under 47 U.S.C. § 221(a). Otherwise, there is no provision in the Federal Communications Act which provides any immunity for acts otherwise in violation of the antitrust laws. Indeed, it is clear that any remedies available under the Federal Communications Act are *not* exclusive. (See Sections 206 and 207 of the Act, 47 U.S.C. §§ 206, 207)

Since the activities being challenged are not expressly exempt from the antitrust laws, any repeal must be by

implication. But "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); see also *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-8; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962); *Georgia v. Pennsylvania Railroad Co.*, 324 *U.S.* 439, 456-7 (1945). No such repugnancy exists here.

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## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**(Appendix Follows)**

## Appendix

### STATUTORY PROVISIONS

Section 1 of the Sherman Act, 26 Stat. 209, § 1 (1890) as amended 50 Stat. 693 (1937), 69 Stat. 282 (1955), 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 26 Stat. 209, § 2 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 206 of the Communications Act, 48 Stat. 1072, § 206 (1934), 47 U.S.C. § 206:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sutstained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 207 of the Communications Act, 48 Stat. 1073, § 207 (1934); 47 U.S.C. § 207:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Section 221 of the Communications Act, 48 Stat. 1080, § 221 (1934) as amended 68 Stat. 64, § 4 (1954) and 70 Stat. 932, § 3 (1956); 47 U.S.C. § 221:

> (a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another tele-

phone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local government authority.

(c) For the purpose of administering this chapter as to carriers engaged in wire telephone commmunication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.